IN THE

Supreme Court of the United States

October Term, 1946

Nos. 922, 923, 925, 926, 930, 933

FEDERAL TRADE COMMISSION, *Petitioner*

v.

THE CEMENT INSTITUTE, *et al.*; AETNA PORTLAND CEMENT COMPANY, *et al.*; CALAVERAS CEMENT COMPANY, *et al.*; HURON PORTLAND CEMENT COMPANY; UNIVERSAL ATLAS CEMENT COMPANY; BLAINE S. SMITH, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

WILLIAM J. DONOVAN,
GEORGE S. LEISURE,
Counsel for The Cement Institute, et al., No. 922, Aetna Portland Cement Company, et al., No. 923, and Blaine S. Smith, et al., No. 933.
Of Counsel:
Donovan Leisure Newton Lumbard & Irvine
Breck P. McAllister
Ira C. Werle

NATHAN L. MILLER,
JOHN H. HERSHBERGER,
Counsel for Universal Atlas Cement Company, No. 930.
Of Counsel:
Knapp, Cushing, Hershberger & Stevenson

CHARLES WRIGHT, Jr.
Counsel for Huron Portland Cement Co., No. 926.
Of Counsel:
Beaumont, Smith & Harris

HERBERT W. CLARK,
Counsel for Santa Cruz Portland Cement Co., No. 925.
Of Counsel:
Morrison, Hohfeld, Foerster, Shuman & Clark

MARSHALL P. MADISON,
Counsel for Pacific Portland Cement Company, No. 925.
Of Counsel:
Pillsbury, Madison & Sutro

EDWARD D. LYMAN,
Counsel for Southwestern Portland Cement Company, No. 925.
Of Counsel:
Overton, Lyman, Plumb, Prince & Vermille.

CHAFFEE E. HALL,
Counsel for Yosemite Portland Cement Company, No. 925.
Of Counsel:
Earl & Hall & Gerdes

A. W. WITHERSPOON,
Counsel for Spokane Portland Cement Company, No. 925.
Of Counsel:
Witherspoon & Witherspoon

WALTER C. FOX, Jr.,
Counsel for Calaveras Cement Company, No. 925.
Of Counsel:
Chickering & Gregory

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In order to relieve this Court of the burden of examining separate briefs, this brief is submitted on behalf of the respondents (petitioners below) in six of the twelve separate cases.

Statement

We do not accept the Government's attempt to state the facts in its 8 page summary (pages 6 to 13 of the petition) of the 170 pages of the findings of the Commission. A long and detailed statement would be required to put before this Court a faithful statement of the facts. This would not aid this Court in the decision of the question now before it.

The Commission instituted this preposterous proceeding against The Cement Institute and 76 companies with plants in all parts of the country, each selling its product in a relatively local market and under different marketing methods employed at different times and places, and the Commission attempted to prove that one and all were engaged in a nationwide conspiracy to market cement pursuant to one method and in a nationwide conspiracy to engage in a variety of practices "in aid or support" of this one method. In this proceeding the Commission simply failed in its proof and therefore could not and did not find the nationwide conspiracy charged.

In brief, the order entered by the Commission, as stated on pages 6 and 7 of the petition, enjoins any agreement or conspiracy to use the "multiple basing-point delivered-price system" (par. 1) or to perform certain acts "in aid or support" thereof (par. 2) or to discriminate in price by charging varying "mill net prices" (par. 3).

Questions Presented

The three questions presented in the petition do not raise the basic question decided by the Circuit Court of Appeals and that is "whether the Commission has found that respondents have entered into a nationwide conspiracy, as charged, to restrain competition in price in the sale of cement by use of the multiple basing point system of pricing, in violation of Sec. 5 of the Federal Trade Commission Act" (R. 16763). Fully one-half of the opinion of Judge Major (R. 16770 to 16797) is devoted to a careful and detailed review of the findings which at the outset he characterized as "extremely lengthy, and we might add com-

plicated, and difficult to comprehend" (R. 16770). The conclusion reached by the Circuit Court of Appeals was that the findings made did not sustain the charge in the complaint and therefore the order under review. This holding is basic.

The petitioner has not seen fit to state this as one of the questions presented for review possibly because it does not want to emphasize the fact that this basic question is not one that this Court would consider. In its petition the Government has not pointed to a single finding out of the 170 pages of findings that any two or more of the respondents agreed to use what is called a multiple basing point system in the sale of cement.

The findings summarized on pages 8 to 13 of the petition point to none. On pages 9 and 10 it is said that members of the industry,—without saying who—have by understandings and agreements,—without saying what or when—developed substantial uniformity of action and that some of the current practices,—without saying what—originated in agreements made many years earlier, without saying when, what or between whom. It is also said on page 11 that respondents' pricing system—the findings disclose that there were several different methods at different times and in different parts of the country—came into existence and its territorial application was extended from time to time, as the result of understandings and agreements among cement producers,—without saying when, what or between whom—and that the system once put into operation did not require renewed understandings or agreements to maintain identical delivered prices.

The findings cited on page 10 expressly state that all did not agree to the supposed understandings, without saying who did (See Findings, Par. 6(a), R. 15984).

In the Circuit Court of Appeals the Commission attempted for the first time to maintain, as the Court said, that the conspiracy now charged originated in 1929 with the organization of the Institute and the Commission evidently did this to avoid the argument of respondents (petitioners below) as to the effect of the decision of this Court in 1925 in *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588 (R. 16767). In that case this Court held that the use of basing points to determine delivered prices was not "the result of any collective activity . . ." but was "rather the natural result of the development of the business" (*id.* 598).

1. The first question presented is whether the evidence supports certain assumed findings of the Commission.

The lower court did not reach this issue and held that the findings as made did not support the order. It set aside only one minor finding.

There is no question in the case of a conspiracy "to restrict competition by various means and methods", as stated in the question presented. The sole question is whether there was a conspiracy to use a particular pricing method and to do certain things "in aid or support" thereof. The question as stated in the petition injects an element not presented by the record.

The reasons assigned for asserting error under this question are trivial and will be discussed later.

2. The second question presented poses two questions:

A. Whether proof and findings of collective action "to prevent such practices as might in any respect impair" respondents' multiple basing-point delivered-price system

warranted a finding of agreement and combination to maintain the system.

These other practices are now referred to by the Government as acts of prevention whereas the contention below was that they were acts of implementation[1] and the lower court so described them (R. 16769). There is a great difference between the two. Plainly the validity of the Commission's order as to these other practices, whether they be legal or illegal when separately considered, depends upon a basic finding of a conspiracy to maintain the system and the lower court held that there was none. Proof of conspiracy may not be found in isolated and unrelated overt acts. Judge Major pointed out at the close of his opinion that this vast record "may and perhaps does disclose methods and practices by some of the respondents which are prohibited" (R. 16814) and, after mentioning a few, said:

> "Undoubtedly the Commission has the authority to proceed against those whose methods and practices are illegal, but such authority affords no justification for the instant proceeding directed indiscriminately at all the members of the industry, good and bad alike." (R. 16815)

B. Whether a reviewing court may on its own independent appraisal of the evidence reject the Commission's finding of a combination.

If the purpose of this question is to suggest that, in the case of conflicting inferences, the Circuit Court of Appeals substituted its own for those of the Commission, a careful reading of the opinion of Judge Major shows that

[1] See Commission brief below, point IV, pars. 4-7, pp. 130, 140, 161, 167.

the Circuit Court of Appeals did no such thing. Further, as the Government states on page 8 of its petition, the lower court set aside only one minor finding.

3. The third question presented also poses two questions:

A. Whether sales at delivered prices to customers at different locations "at varying mill net prices constitute price discriminations prohibited by Section 2(a) of the Clayton Act."

The question presented is separate and distinct from the first two questions as it does not involve any question of conspiracy yet the order of the Commission rests wholly on conspiracy.

Where the price paid by the buyer and charged by the seller is a delivered price, there is no such thing as a "mill net price." Price is what the buyer pays. Mill net is what is left for the seller after deduction of transportation cost to the buyer's destination.

The Commission in its brief below made what Judge Major described as "the bold statement that the illegality of variation in mill net prices has been laid to rest by the decisions of the Supreme Court in the Corn Products and Staley cases" (R. 16795). Judge Major continued:

> "We do not so understand. We do understand from those decisions that when a product is sold from a base other than the point of actual shipment and phantom freight thereby collected, a discrimination in violation of the Clayton Act results. Certainly the court in those decisions did not hold that freight absorption was discriminatory; in fact, that question was expressly left open. . . ." (R. 16795)

He then analyzed those two decisions carefully (R. 16796-7, 16812-14) and at R. 16814, referring to the question of the right of a base mill to absorb freight to meet the equally low price of a competitor under Section 2(b) of the Clayton Act, said that "we think these cases taken together indicate an approval of such practice."

The use of the term "mill net price" in the question presented is an effort by the Commission to ask this Court to write into the Robinson Patman Act amendment to the Clayton Act words which the Congress has declined to write in though repeatedly urged to do so. This legislative history was reviewed by this Court in *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, where it was pointed out that the Congress rejected a proposed amendment to the Robinson-Patman bill which would have defined the word "price" as used in Section 2 of the Clayton Act as meaning "the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor" (324 U. S. at 737).

B. The second part of the third question presented is based on the false assumption that respondents systematically meet but never go below the delivered prices of their respective competitors.

The Commission found

> ". . . there have been, of course, instances where cement manufacturers have made concessions in price or terms of sale; from time to time numerous concessions have been made in particular areas; and in the depth of the economic depression in the early 1930's concessions were widespread . . ." (Finding 6(e), R. 15987).

The evidence in support of this finding is abundant.

Apart from that, however, the question presented involves the proviso to Sec. 2(b) of the Clayton Act which permits a seller to rebut a prima facie case of price discrimination by showing that his lower price "was made in good faith to meet an equally low price of a competitor," 38 Stat. 730 as amended by the Act of June 19, 1936, 49 Stat. 1526; 15 U. S. C. Sec. 13. The argument of the Commission below as to lack of good faith was based upon the claim of a conspiracy among the corporate respondents. The holding of the Circuit Court of Appeals that there was no finding of the conspiracy charged disposed of that point and the Circuit Court so held and added that, absent a conspiracy, there was no reason to question the good faith of the sellers of cement when they lowered delivered prices to meet equally low prices of competitors (R. 16795).

The Government adds nothing when it states that respondents do what they do "systematically." Section 2(b) of the Clayton Act permits a seller to quote a lower delivered price to meet an equally low price of a competitor and what it permits it permits always and for every seller.

Reasons for Not Granting the Writ

None of the questions presented in the petition is within Rule 38, paragraph 5(b) of the Rules of this Court. None is of sufficient importance to warrant this Court in burdening itself with these cases.

We have already noted that the basic holding of the Circuit Court of Appeals is not presented in any of the three questions though it appears as the first error specified. A decision on this question necessarily involves only

the findings made by the Commission in this particular matter and will be of no general importance. The opinion of the Circuit Court of Appeals will furnish an adequate guide to the Commission in other proceedings.

We pass over the opening sentence on page 15 of the petition in which the Government makes the wholly improper statement that there is not a vestige of price competition in the marketing of the product of this industry. Meeting and on numerous occasions underselling competitors' lower prices, as the Commission found was the practice of the industry, is certainly price competition—indeed, the only practicable price competition in the sale of a highly standardized product like cement.

The size of the record, the duration of the proceedings and the three days of oral argument in the court below show the careful consideration that has been given to this case by the Circuit Court of Appeals. A reading of the opinion of Judge Major reveals the painstaking care with which he examined the record and considered each and every argument made by the Commission below and by the respondents (petitioners below).

The Court did not state as the petition states on page 16 that a "question or questions of law" were presented that should be reviewed by this Court. The Court did say that it would give the Commission a chance to revise its findings "if it could and so desired" but for the fact that "a question of law" was involved, "which ultimately and the sooner the better, must be decided by the Supreme Court" (R. 16785).

The question of law, referred to by the Court, was thus stated by the Commission as its principal point in its brief as respondent below:

> "The multiple basing point system concurrently used by the respective corporate petitioners is a device for automatically frustrating price competition and is inherently collusive, oppressive and unfair" (See Commission brief in the Court below, p. 45).

The Commission contended in argument, as the Court stated, that the basing point "system is illegal *per se*" (R. 16815). Indeed, that was its principal contention.

If our reading of the three questions presented is correct, the Government has not even presented the question in its petition, no doubt because the Circuit Court of Appeals completely demolished the contention.

The Commission was driven to take this position through its failure to prove and its failure to find any agreement or conspiracy among the respondents. And it took this position in the face of the decision of this Court in 1925 in *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588, and the more recent decision in *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726. Judge Major correctly applied these decisions and, after reviewing the legislative history on this subject, said:

> "Notwithstanding this Congressional attitude as recognized by the Supreme Court, this court is now urged to hold that the system is illegal per se, and to require that cement be sold on an f.o.b. plant basis.
>
> In our judgment, the question as to whether the basing point price system should be declared illegal rests clearly within the legislative domain. We know of no criticism so often and so forcibly directed at courts, particularly Federal courts, as their propensity for usurping the functions of Congress. If this pricing system which Congress has over the

> years steadfastly refused to declare illegal, although vigorously urged to do so, is now to be outlawed by the courts, it will mark the high tide in judicial usurpation." (R. 16815-16)

The decision below is not in probable conflict with applicable decisions of this Court as the Government attempts to show on pages 17-19 of its petition. The lower court in its examination of the findings gave full effect to the broad rule stated by this and other federal courts in the Sherman Act cases cited in the footnote on page 18 of the petition. In fact, it was by reason of the failure of proof of the Commission and the resulting inadequacy of its findings that the Commission invoked and the lower court considered the even more far-reaching rule that this marketing method was illegal *per se*.

The two cases cited in the text on page 18 of the petition, *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67 and *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, state the familiar rule that the findings of fact of the Federal Trade Commission are conclusive if supported by substantial evidence. No one disputes that.

On page 19 of the petition the Government criticizes the lower court for holding that the contention of the Commission that the Institute was organized to maintain the multiple basing point delivered price system could not be based upon the fact that the original Articles of Association of The Cement Institute included the provision that one of its purposes was to establish and maintain "all such lawful trade customs and usages . . . as the Institute may deem advisable" (Finding 7(o), R. 16000). On the face of it the contention was absurd.

The Government then asserts that, from a reading of these words, the lower court "conclusively presumed" that the Institute did not engage in unlawful activities. The opinion of Judge Major will be searched in vain for any conclusive presumption. On the contrary, Judge Major made a detailed and careful examination of the findings and certain undisputed facts relative to the Institute, its origin, purposes and activities (see the opinion of Judge Major at R. 16769-73, 16776-7, 16780, 16784-6, 16799, 16802, 16807, 16809-10, 16812) and his conclusion as to the Institute is based on that examination and not on any "conclusive presumption" that the Government now asserts was drawn from the quoted phrase in the original Articles of Association.

The Government refers to the decisions of this Court in *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726 and *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746 on pages 19 to 21 of the petition. There was no question of conspiracy in those cases. The statement on the top of page 20 is that the lower court erred in not sustaining the Commission's order as to the few so-called non-base mills before the court. Judge Major stated that undoubtedly the collection of so-called phantom freight by a non-base mill constituted a discrimination violative of Section 2(a) of the Clayton Act as interpreted by this Court in the *Corn Products* and *Staley* cases and that the Commission could proceed against mills engaging in this practice (R. 16792). However, he pointed out that it does not follow that the few mills that followed this practice were engaged in a conspiracy with the great bulk of the mills that did not (R. 16792-3, see also 16814). Also it is important to note that this case was tried as

a conspiracy case and the Commission made no claim, apart from the claim of conspiracy between sellers, that the alleged discriminatory prices of the non-base mills had the effect upon competition set forth in Section 2(a) of the Clayton Act. In view of this the Circuit Court of Appeals would have exceeded its powers if it had sustained this one paragraph of the Commission's order as to a few of the corporate respondents. It acted properly in not doing so.

The other reasons stated on these pages of the petition have been discussed above.

Conclusion

We respectfully submit that the Government has not advanced any adequate reason for granting the petition for writs of certiorari and that the petition should be denied. This long and unnecessarily burdensome and expensive litigation should end.

(Sgd) William J. Donovan
(Sgd) George S. Leisure
Counsel for The Cement Institute, et al., No. 922, Aetna Portland Cement Company, et al., No. 923, and Blaine S. Smith, et al., No. 933
2 Wall Street, New York 5, N. Y.

Of Counsel:

Donovan Leisure Newton
Lumbard & Irvine
Breck P. McAllister
Ira C. Werle

(Sgd) NATHAN L. MILLER
71 Broadway, New York 6, N. Y.

(Sgd) JOHN H. HERSHBERGER
208 S. La Salle Street,
Chicago 4, Ill.
Counsel for Universal Atlas Cement Company, No. 930

Of Counsel:

KNAPP, CUSHING, HERSHBERGER & STEVENSON

(Sgd) CHARLES WRIGHT, JR.
Counsel for Huron Portland Cement Co., No. 926
Ford Building, Detroit 26, Mich.

Of Counsel:

BEAUMONT, SMITH & HARRIS

(Sgd) HERBERT W. CLARK
Counsel for Santa Cruz Portland Cement Co., No. 925
Crocker Building,
San Francisco 4, California

Of Counsel:

MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK

(Sgd) MARSHALL P. MADISON
Counsel for Pacific Portland Cement Company, No. 925
Standard Oil Building,
San Francisco, California

Of Counsel:

PILLSBURY, MADISON & SUTRO

(Sgd) EDWARD D. LYMAN
Counsel for Southwestern Portland Cement Company, No. 925
Roosevelt Building,
Los Angeles, California

Of Counsel:
OVERTON, LYMAN, PLUMB, PRINCE & VERMILLE

(Sgd) CHAFFEE E. HALL
Counsel for Yosemite Portland Cement Company, No. 925
215 Market Street,
San Francisco, California

Of Counsel:
EARL & HALL & GERDES

(Sgd) A. W. WITHERSPOON
Counsel for Spokane Portland Cement Company, No. 925
Peyton Building,
Spokane, Washington

Of Counsel:
WITHERSPOON & WITHERSPOON

(Sgd) WALTER C. FOX, JR.
Counsel for Calaveras Cement Company, No. 925
111 Sutter Street,
San Francisco, California

Of Counsel:
CHICKERING & GREGORY